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6 Attorneys for Defendants HARTFORD LIFE AND ACCIDENT INSURANCE  
COMPANY; and AMERICAN PRESIDENT LINES, LTD

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN FRANCISCO DIVISION

11 PATRICIA HOFFER, ) Case No.: CV-08-2174-MHP  
12 Plaintiff, )  
13 vs. )  
14 HARTFORD LIFE AND ACCIDENT )  
INSURANCE COMPANY; AMERICAN )  
PRESIDENT LINES, LTD., and DOES 1 )  
THROUGH 25, )  
15 Defendants. )  
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1 TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that at 2:00 p.m., on August 19, 2008, or as soon  
3 thereafter as the matter may be heard, in Courtroom 15, 18<sup>th</sup> Floor, of the above court,  
4 defendants Hartford Life And Accident Insurance Company ("Hartford") and American  
5 President Lines, Ltd. ("APL") (hereinafter collectively "Defendants") will move, and hereby do  
6 move, for an order dismissing the "Complaint Employee Retirement Income Security Act and for  
7 Damages" ("the Complaint") filed herein by plaintiff Patricia Hoffer ("Plaintiff"). Alternatively,  
8 Defendants will request an order striking portions of the Complaint, as set forth more fully in the  
9 Memorandum of Points and Authorities accompanying this motion.

10 As set forth in the accompanying memorandum, this motion is brought pursuant to  
11 Federal Rule of Civil Procedure 12(b)(6) and 12(f) on the grounds that Plaintiff has failed to state  
12 a claim upon which relief can be granted and that Plaintiff's complaint contains immaterial,  
13 impertinent or scandalous matter that should be stricken.

14 The motion is based on this notice, the Memorandum of Points and Authorities below,  
15 the pleadings and papers on file herein, and any argument that may be heard.

16 Respectfully submitted,

17  
18 Dated: July 10, 2008 KELLY, HOCKEL & KLEIN P.C.  
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21 By //Thomas K. Hockel  
22 Thomas K. Hockel  
23 Attorneys for Defendants  
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1 TABLE OF CONTENTS  
2

	PAGE (S)
I. STATEMENT OF FACTS .....	2
II. POSTURE OF THE CASE.....	2
III. ARGUMENT .....	3
A. The Court Must Dismiss Plaintiff's First Cause of Action Against Hartford Because, as a Third Party Insurer, Hartford Is Not a Proper Defendant in An Action to Recover ERISA Benefits. ....	3
B. Plaintiff's Second Cause of Action, Against APL, Fails to State a Claim Under ERISA and Must Be Dismissed.....	4
C. Plaintiff's Third and Fourth Causes of Action Against Hartford for Breach of Contract and "Bad Faith" Are Preempted by ERISA and Must Be Dismissed .....	5
D. Plaintiff's Allegations of Entitlement to Punitive Damages Based on "Evil Motive," "Malice," "Fraud," "Oppression" and "Conscious Disregard" Must Be Stricken As Immaterial, Impertinent and Scandalous under FRCP 12(f). .....	6
IV. CONCLUSION.....	8

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 TABLE OF AUTHORITIES  
2  
34  
5  
6  
7  
8  
9  
PAGE(S)

## Cases

5	<i>Bast v. Prudential Ins. Company of America,</i>	
6	150 F.3d 1003 (9 <sup>th</sup> Cir. 1998) .....	9
7	<i>Dytrt v. The Mountain State Telephone and Telegraph Company,</i>	
8	921 F.2d 889 (9 <sup>th</sup> Cir. 1990) .....	7
9	<i>Ellenburg v. Brockway, Inc.,</i>	
10	763 F.2d 1091 (9th Cir. 1985) .....	6
11	<i>Everhart v. Allmerica Life Insurance Company,</i>	
12	275 F.3d 751 (9 <sup>th</sup> Cir. 2001) .....	3
13	<i>Fantasy, Inc. v. Fogerty,</i>	
14	984 F.2d 1524 (9 <sup>th</sup> Cir. 1993) .....	8
15	<i>Ford v. MCI Communications Corporation Health and Welfare Plan,</i>	
16	399 F.3d 076, 1081 (9 <sup>th</sup> Cir. 2005) .....	4
17	<i>Fort Halifax Packing Co. v. Coyne,</i>	
18	482 U.S. 1, (1987).....	7
19	<i>Gelardi v. Pertec Computer Corp.,</i>	
20	761 F.2d 1323 (9 <sup>th</sup> Cir. 1985) .....	3
21	<i>Gibson v. Prudential Ins. Co.,</i>	
22	915 F.2d 414 (9 <sup>th</sup> Cir. 1990) .....	3
23	<i>Group Life Ins. Co. v. Western Growers Assur. Trust,</i>	
24	953 F.2d 543 (9th Cir. 1992) .....	7
25	<i>Madden v. ITT Long Term Disability Insurance Plan for Salaried Employees,</i>	
26	914 F. 2d 1279 (9 <sup>th</sup> Cir. 1990) .....	3
27	<i>Massachusetts Mutual Life Ins. Co. v. Russell,</i>	
28	473 U.S. 134 (1985).....	9

1	<i>Mertens v. Hewitt Associates,</i>	
2	508 U.S. 248 (1993).....	8
3	<i>Pilot Life Ins. Co. v. Dedeaux,</i>	
4	481 U.S. 41 (1987).....	7
5	<i>Scott v. Gulf Oil Corp.,</i>	
6	754 F.2d 1499 (9th Cir. 1985). .....	7
7	<i>Solok v. Bernstein,</i>	
8	803 F.2d 532, 536-537 (9 <sup>th</sup> Cir. 1986) .....	9
9		

## **Statutes**

10	29 U.S.C. § 1002(16)(A)(i).....	3
11	29 U.S.C. § 1101.....	4
12	U.S.C. § 1132(a)(1)(B) .....	3, 5
13	29 U.S.C. § 1144(a) .....	6
14	29 U.S.C. § 1144(c) .....	6
15	<i>Federal Practice and Procedure</i> § 1382, at 706-07 (1990).....	7

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. STATEMENT OF FACTS

According to the allegations in the Complaint, Plaintiff was employed by APL and, through her employment, was a participant in various employee welfare benefit plans that provided disability insurance, medical and vision benefits, dental benefits, life insurance benefits and retirement benefits. (See Complaint, ¶¶ 5-7.) One such plan provided long term disability benefits through a Group Long Term Disability Policy (“the LTD Plan”) issued by Hartford to APL. (See *id.*, ¶¶ 7-9.)

9 Plaintiff alleges she became disabled and eligible for disability benefits, and began  
10 receiving benefits, on or about September 27, 1997. (Complaint, ¶ 12.) Plaintiff alleges that  
11 Hartford wrongfully terminated her disability benefits on March 28, 2007, contrary to the LTD  
12 Plan and in violation of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C.  
13 Section 1101, *et seq.*

## II. POSTURE OF THE CASE

15 As reflected in the Court's docket, the Complaint was filed on April 28, 2008, and was  
16 served on Hartford on May 8, 2008. Plaintiff's counsel stipulated to two extensions while the  
17 parties attempted to meet-and-confer regarding the contents of the Complaint and this motion.  
18 The parties' efforts were ultimately unsuccessful, leading to the filing of this motion.

### III. ARGUMENT

**A. The Court Must Dismiss Plaintiff's First Cause of Action Against Hartford Because, as a Third Party Insurer, Hartford Is Not a Proper Defendant in An Action to Recover ERISA Benefits.**

Plaintiff's First Cause of Action is asserted against Hartford alone and, in summary, seeks the recovery of further long-term disability benefits under the group long-term disability insurance policy issued by Hartford to APL. (Complaint, ¶¶ 9, 10, 16-17.) Plaintiff alleges that the denial of benefits was in violation of ERISA. (Complaint, ¶ 16.)

ERISA allows a plan beneficiary to institute an action to recover benefits under 29 U.S.C.

10 § 1132(a)(1)(B). However, it is well-settled that the ERISA Plan is the only proper defendant in  
11 such an action. *Everhart v. Allmerica Life Insurance Company*, 275 F.3d 751, 754 (9<sup>th</sup> Cir. 2001)  
12 [the plan alone--not the insurer--is proper party in an action to recover ERISA benefits under  
13 1132(a)(1)(B)]; *see also Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9<sup>th</sup> Cir. 1985)  
14 (action to recover benefits allowed only against the Plan as an entity); *Gibson v. Prudential Ins.*  
15 *Co.*, 915 F.2d 414, 417 (9<sup>th</sup> Cir. 1990); *Madden v. ITT Long Term Disability Insurance Plan for*  
16 *Salaried Employees*, 914 F. 2d 1279, 1287 (9<sup>th</sup> Cir. 1990) (improper to include employer in  
17 action to recover benefits).

In holding that the plaintiff could not sue a third party insurer in an action to recover insurance benefits under ERISA, the Ninth Circuit in *Everhart* stated: "We find no reason to depart from the established precedent of this circuit that has expressly considered the issue, that § 1132(a)(1)(B) does not permit suits against a third-party insurer to recover benefits when the insurer is not functioning as a plan administrator."

23 Plaintiff alleges in the Complaint that Hartford “administered” the LTD Plan (Complaint,  
24 ¶ 7), but does not allege that Hartford was the Plan Administrator. ERISA defines the “Plan  
25 Administrator” as “the person specifically so designated by the terms of the instrument under  
26 which the plan is operated[.]” 29 U.S.C. § 1002(16)(A)(i). The Group Benefits Plan booklet  
27 attached as “Exhibit 1” to the Complaint clearly does not define Hartford as the Plan  
28 Administrator. To the contrary, Hartford is merely identified as the insurer.

Nor does the fact that Hartford made the claims decision compel the conclusion that it was the “Plan Administrator.” At most, Hartford was the *claims administrator*. *Everhart, supra*, 275 F.3d at 754; *see also Ford v. MCI Communications Corporation Health and Welfare Plan*, 399 F.3d 076, 1081-1082 (9<sup>th</sup> Cir. 2005) (Hartford found not to be the Plan Administrator even though it made the claim decision). ERISA does not permit suit against the entity determining eligibility for benefits or that was functioning as a claim administrator.

Under clearly established Ninth Circuit precedent, Hartford, as a third party insurer, is not a proper defendant in an action to recover ERISA benefits. The LTD Plan is the proper defendant, not the insurer. Plaintiff has failed to name the LTD Plan as a defendant. As such,

Plaintiff’s first cause of action fails to state a claim and must be dismissed.

**B. Plaintiff’s Second Cause of Action, Against APL, Fails to State a Claim Under ERISA and Must Be Dismissed.**

Plaintiff’s Second Cause of Action is asserted solely against APL, as her former employer. Although the nature and basis of the cause of action is not clear, it appears to be another claim for ERISA benefits. (Complaint, p. 4.) In summary, Plaintiff appears to contend that APL terminated her employment on March 12, 2008, for the purpose of denying her “...substantial medical and related benefits...”. (*See Complaint, ¶¶ 20-23.*) She contends her termination violated 29 U.S.C. § 1101, *et seq.*, and she seeks to recover benefits and other damages.

Plaintiff’s Second Cause of Action is untenable for several reasons.

First, Plaintiff’s Second Cause of Action fails for the same reason her First Cause of Action fails: the claim purports to be a cause of action to recover benefits under ERISA, but it is asserted against Plaintiff’s former *employer*, rather than the Plan or the Plan Administrator. *See Everhart, et al., supra*. The employer itself is not a proper defendant in an action to recover ERISA benefits. *Madden, supra*, 914 F.2d at 1287 (inclusion of employer was improper in an ERISA suit to recover benefits), *Gelardi, supra*, 761 F.2d at 1324-1325 (affirming summary judgment in favor of employer on the ground that plaintiff must sue the Plan in action to recover benefits).

1       Second, Plaintiff's Second Cause of Action does not allege any common law claim for  
 2 "wrongful termination" unrelated to her ERISA benefits. Rather, she is asserting her claim for of  
 3 benefits under ERISA, as is evident from the title of the cause of action as well as the allegations  
 4 in the cause of action. (Complaint, ¶¶ 20-23.) Plaintiff couches her claim as a cause of action for  
 5 "wrongful termination" against APL for which she seeks benefits and "punitive damages."<sup>1</sup>  
 6 However, ERISA does not provide a basis for a general claim for "wrongful termination" based  
 7 on the denial of a claim for benefits.<sup>2</sup> Plaintiff's claim against the Plan as a "plan participant"<sup>3</sup> is  
 8 limited to the recovery of benefits due to her under the terms of the Plan. 29 U.S.C. §  
 9 1132(a)(1)(B).<sup>4</sup> ERISA simply does not provide the claims she attempts to assert.

10       Third, as explained above, a plan participant may bring an action to recover benefits due  
 11 under the terms of the plan under 29 U.S.C. § 1132(a)(1)(B), but here Plaintiff's Second Cause  
 12 of Action fails because she has not sufficiently pleaded her entitlement to any specific benefit  
 13 under the Plan, nor has she alleged the denial of any such benefits by the Plan. Her vague  
 14 allegation of the loss of "...substantial medical and related benefits..." due to her termination  
 15 (Complaint, ¶ 23) is insufficient to satisfy the elements of a claim under 29 U.S.C. §  
 16 1132(a)(1)(B).

17       **C. Plaintiff's Third and Fourth Causes of Action Against Hartford for Breach of  
 18 Contract and "Bad Faith" Are Preempted by ERISA and Must Be Dismissed**

20       <sup>1</sup> The impropriety of punitive damages under ERISA is addressed below.

21       <sup>2</sup> ERISA does preclude employers from discharging their employees, either actually or constructively, in order to  
 22 prevent their *pension rights* from vesting, but that is not at issue here. See 29 U.S.C. 1140. Even if it were at issue,  
 23 Plaintiff failed to allege the "specific intent" required to maintain that claim. In fact, Plaintiff admits that her LTD  
 24 benefits were terminated and *then* she was discharged, which precludes a finding of discharge *in order to avoid*  
 25 vesting of benefits.

26       <sup>3</sup> ERISA defines a "plan participant" as "[a]ny employee or former employee of an employer...who is or may  
 27 become eligible to receive a benefit of any type from an employee benefit plan...." 29 U.S.C. § 1002(7). The  
 28 Supreme Court has held that a former employee does not fall within the "may become eligible" language of this  
 definition unless he has a realistic expectation of returning to covered employment or a colorable claim to vested  
 benefits. *Firestone v. Bruch*, 489 U.S. 101, 117 (1989). Plaintiff has alleged neither.

29       <sup>4</sup> Inasmuch as ERISA does not provide a "wrongful termination" right of action or recovery, the "wrongful  
 30 termination" language in paragraphs 20, 21, 23 and 24 of Plaintiff's Complaint is immaterial and impertinent and  
 31 should be stricken under F.R.C.P. 12(f).

1 Plaintiff's Third and Fourth Causes of Action are textbook common law claims for  
 2 breach of contract and breach of the covenant of good faith and fair dealing ("bad faith") against  
 3 Hartford. Both are preempted by ERISA and must be dismissed because plaintiff's exclusive  
 4 remedies are those available under ERISA.

5 ERISA § 514 provides that its provisions "...shall supersede any and all State laws  
 6 insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. §  
 7 1144(a). "State law" includes all laws, decisions, rules, regulations or other State action having  
 8 the effect of law. *See* 29 U.S.C. § 1144(c). A law "relates to" a plan if it has a connection with or  
 9 reference to such a plan. *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1095 (9th Cir. 1985); *Fort*

10 *Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (quotation omitted).

11 ERISA contains one of the broadest preemption clauses ever enacted by Congress. *PM*  
 12 *Group Life Ins. Co. v. Western Growers Assur. Trust*, 953 F.2d 543, 545 (9th Cir. 1992)  
 13 (quotation omitted). The ERISA preemptive provision is to be broadly construed and extends to  
 14 common law tort and contract actions. *Ellenburg, supra*, 763 F.2d at 1095; *Pilot Life Ins. Co. v.*  
 15 *Dedeaux*, 481 U.S. 41, 48 (1987). Even claims brought under state law doctrines that do not  
 16 explicitly refer to employee benefit plans are preempted when the claims arise from the  
 17 administration of such plans whether directly or indirectly. *Id.*, 763 F.2d at 1095; *See also Scott*  
 18 *v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985).

19 Plaintiff's common law claims for breach of contract and bad faith arise out of her claim  
 20 for benefits under the Group Long Term Disability Policy issued by Hartford to APL.  
 21 (Complaint, ¶¶ 26, 37.) These claims amount to nothing more than an effort to recover benefits.  
 22 They are clearly superseded by ERISA and must therefore be dismissed. *Dyrt v. The Mountain*  
 23 *State Telephone and Telegraph Company*, 921 F.2d 889, 897 (9<sup>th</sup> Cir. 1990) (affirming dismissal  
 24 of breach of contract and bad faith claims as preempted under ERISA).

25 **D. Plaintiff's Allegations of Entitlement to Punitive Damages Based on "Evil Motive,"**  
 26 **"Malice," "Fraud," "Oppression" and "Conscious Disregard" Must Be Stricken As**  
**Immaterial, Impertinent and Scandalous under FRCP 12(f).**

27 Plaintiff repeatedly alleges that Hartford and APL acted maliciously, fraudulently,  
 28 oppressively, with wrongful intention of injuring her, from an improper and evil motive

1 amounting to malice, and in conscious and reckless disregard of her rights. (See Complaint, ¶¶  
 2 18, 24, 35, and 42.) Plaintiff also alleges that Hartford and APL acted in “bad faith” or “without  
 3 just cause” and that she is entitled to recover punitive damages. (See Complaint, ¶¶ 18, 24, 35,  
 4 and 42.)

5 Rule 12(f) provides that, before responding to a pleading, any party may move to strike  
 6 any “insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” As  
 7 explained by the court in *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993),  
 8 “Immaterial” matter is that which has no essential or important relationship to the claim for relief  
 9 or the defenses being pleaded.’ 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and*

10 *Procedure* § 1382, at 706-07 (1990). ‘Impertinent’ matter consists of statements that do not  
 11 pertain, and are not necessary, to the issues in question. *Id.* at 711.” Meanwhile, something is  
 12 “scandalous” if it “contain[s] material damaging to reputation.”

13 In *Pilot Life, supra*, the Supreme Court held that state law “bad faith” claims and  
 14 damages are not available to plaintiffs. *Pilot Life, supra*, 481 U.S. at 48. Subsequent cases have  
 15 uniformly concluded that such extracontractual damages under such claims are not available  
 16 under ERISA. See *Mertens v. Hewitt Associates*, 508 U.S. 248, 261-262 (1993) *Massachusetts*  
 17 *Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), *Solok v. Bernstein*, 803 F.2d 532, 536-537  
 18 (9<sup>th</sup> Cir. 1986); *Bast v. Prudential Ins. Company of America*, 150 F.3d 1003, 1010-1011(9<sup>th</sup> Cir.,  
 19 1998).

20 Inasmuch as ERISA’s statutory scheme is limited, as explained above, to the recovery of  
 21 benefits due under the Plan, and claims for bad faith, extracontractual and punitive damages are  
 22 not available, Plaintiff’s allegations of malice, fraud, oppression, wrongful intention, improper or  
 23 evil motive, bad faith, and conscious disregard, as well as her claims for punitive or other  
 24 extracontractual damages, are immaterial, impertinent and scandalous.

25 If any portion of Plaintiff’s action is not dismissed, the Court should strike paragraphs 18,  
 26 24, 35, and 42, as well as her prayer for emotional distress and punitive damages.  
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1                           **IV. CONCLUSION**

2                           For the foregoing reasons, the Court should dismiss Plaintiff's Complaint in its entirety.  
3 Alternatively, if any portion of Plaintiff's Complaint is not dismissed, the Court should strike the  
4 immaterial, impertinent and scandalous allegations in the Complaint.

5                           Respectfully submitted,  
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7                           Dated: July 10, 2008

8                           KELLY, HOCKEL & KLEIN P.C.

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10                          By // Thomas K. Hockel  
11                           Thomas K. Hockel  
12                           Attorneys for Defendants

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